Filed 3/10/09 P. v. Albino CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUAN R. ALBINO, Defendant and Appellant.	B203983 (Los Angeles County Super. Ct. No. GA 065644)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Juan Alberto Albino appeals his conviction for possession of cocaine, furnishing cocaine to a minor, and various sex offenses against a minor. He contends that the court erred in instructing the jury, admitting impeachment evidence, requiring him to register as a sex offender, and imposing consecutive terms based upon facts not found by the jury. We affirm this judgment as modified to correct the abstract of judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged in a seven-count information with violations of Health and Safety Code sections 11351 (count 1, possession for sale of a controlled substance) and 11353 (count 2, sale or furnishing a controlled substance to a minor), Penal Code sections 261.5, subdivision (c) (count 5, unlawful sexual intercourse), 288a, subdivision (b)(1) (counts 7 and 8, oral copulation of a person under 18), and 289, subdivision (h) (counts 9 and 10, sexual penetration by a foreign object).[1]

A. Prosecution Case.

S.V. testified that on May 3, 2006, she was living near Colorado and Figueroa in Los Angeles. She went to a friend's house that afternoon with another friend, and smoked some marijuana while she was there. She claimed she did not have anything to drink, although her boyfriend Brett said they both had beer at the party.

Sometime in the evening between 7:00 and 9:00 p.m., she left with Brett. Because he could not give her a ride home, she went to the bus stop and waited several hours for a bus until 11:00 p.m. No bus came. Defendant and a woman drove up in a van and asked if she wanted a ride. Because the bus had not come, she accepted the ride. Defendant dropped the woman off at a bar or a hotel. He asked S.V. if she did drugs, and she told him that she did. He said he would stop at the store and get some drugs. She told him that she had not used rock or crack, wanted to go home and did not want to do drugs.

Defendant went to a house and stopped, went in and returned, saying they "didn't have any." Defendant asked her if she wanted a drink, and she said yes. Defendant went to a store and bought her a beer. While he was parked at the store he started putting something

[1] There were no counts labeled counts 2, 3, 4, or 6.

up his nose. Defendant drove and then parked near a freeway overpass. He asked again if she wanted to do rock and crack and she said yes. Defendant asked if she wanted to have sex with him, and she said no. She was scared. She went in the back of the van because she did not want him to touch her.

Defendant began hugging her and took her pants off and put crack in her vagina with his fingers and then licked it off. Defendant grabbed her breasts. Defendant, who was wearing a condom, attempted to put his penis in her vagina, and was grabbing her. He was able to penetrate her, but then he stopped. She got up and put her pants on, but he tried to stop her from getting up. She was not sure if he penetrated her because she could not feel anything.

Defendant did not use any force to prevent her from getting out of the van.

They drove to a motel and he got out of the van. She got his cell phone and tried to call the police. Defendant came back with the keys to the motel room. She tried to talk to people at the motel and tell them that she had been raped. No one would let her use their phone, so she left the motel. At a nearby house someone called the police for her.

Earlier in the evening she had sex with her boyfriend and did not use a condom. Her boyfriend testified that when he saw her a few days after the incident, he noticed that she had bruises on her inner thighs. He never saw S.V. use or sell cocaine.

Sergeant Timothy Feeley of the Glendale Police Department conducted a search of defendant's residence in Eagle Rock on May 11, 2006. In a dresser, police discovered three baggies containing cocaine, a digital scale, a bottle of inositol powder, and $574. Inositol is used to cut cocaine. Near defendant's desk they found an aluminum bindle containing a white powder resembling cocaine. In Sergeant Feeley's opinion, the cocaine was possessed for the purpose of sale.

Deputy Luis Olmos of the Los Angeles County Sheriff's Department analyzed the cocaine seized from defendant's house. The first container held 12.81 grams, the second 6.28 grams, the third 1.74 grams of base, and the fourth was a white powder that was not a controlled substance.

Julie Lister, a County-USC Nurse Practitioner, conducted a sexual assault examination of S.V. She found evidence of trauma to S.V.'s vagina, including a bruise on the right groin that she believed resulted from a thumb, irritation and blunt force trauma near the hymen, and a piece of torn condom near the victim's cervix. The bruise on the groin would indicate the use of force. In addition to preparing a rape kit, as part of her examination Lister obtained a swab from S.V.'s right breast and genital area to collect possible saliva.

Sean Yoshii, a criminalist with the Los Angeles Sheriff's Department, analyzed the rape kit. He found defendant's DNA on samples taken from the victim's right breast, sperm found in her vagina, and on the condom fragment.

Tammy Klein, criminalist, analyzed samples taken from the victim's vagina, external genitals, and nostril for controlled substances. There was cocaine present in the vaginal and genital samples.

Edgar Sahagun testified that on May 3, 2006, after 11:00 p.m., S.V. came to his house in Glendale near the motel and asked for help. She told him she had escaped from a man and woman in a van.

B. Defense Case.

Cari Caruso, certified sexual assault nurse examiner, testified on behalf of the defense that she could not determine whether any of the victim's injuries were the result of a nonconsensual act, because bruising, tears and redness can result from a consensual act.

M.G., the victim's mother, testified that a few days after the incident, she discussed it with S.V. S.V. did not tell her that she was forced into the van. S.V. said she had been raped inside a motel room, and that she tried to get away from defendant but he was too strong for her.

Maria Rodriguez, an investigator, testified that she spoke to S.V. and her boyfriend Brett. Brett went with the victim to the bus stop, but his bus came first so he left. S.V. told him that she was forced into the van.

Defendant testified on his own behalf that in 1995, he was convicted of possession of cocaine for purposes of sale. He quit using drugs after that, but started again about eight

months before the current offense. He worked as a contractor doing electrical, plumbing and air conditioning.

On May 11, 2006, police came to his house about 7:00 a.m. He had about 10 to 12 grams of cocaine in his closet. He used three to four grams a day, which he would buy in MacArthur Park. He denied that he possessed the cocaine for sale. The cash the police found was partially his tax refund and an insurance payment for damage to his car. He used the scale to measure the cocaine to make sure he did not use too much.

He bought drugs earlier in the day on May 3, 2006. He saw S.V. and a friend selling drugs at MacArthur Park next to a liquor store, and he got out of his van to go speak to them. He completed a transaction with S.V. and went into the liquor store to buy beer. Defendant, who was with his girlfriend Zuma, told S.V. to put the cocaine behind the passenger seat. She asked him for a ride.

He drove to Eagle Rock, where he dropped his girlfriend off at York and Avenue 54. Defendant drove to a liquor store at Marmion and Figueroa. They both went into the store, and S.V. bought a 40-ounce beer. They left the liquor store and S.V. asked for some cocaine. They pulled into a Burger King where S.V. opened the bag of cocaine and took out a pipe, and used a bill to inhale some cocaine through her nose. Defendant denied putting any cocaine on S.V.'s body.

After driving some more, defendant stopped at a motel and registered while S.V. waited in his van. When he got back to the van, she demanded $100 for having sex with him. He told her he did not have any cash. S.V. told him she was going to call the police and accuse him of raping her. Defendant told her to go ahead, and S.V. left on foot. He denied having sex with S.V. at the motel.

The jury convicted defendant on counts 2, 7, 8, 9 and 10, and found him guilty of the lesser included offense of possession of a controlled substance on count 1. The jury found true the special allegation that the victim was at least four years younger than the defendant pursuant to Health and Safety Code section 11353.1, subdivision (a)(3). The jury failed to reach a unanimous verdict on count 5, and the court declared a mistrial on that count.

DISCUSSION

I. INSTRUCTIONAL ERRORS.

A. Definition of "Furnish" on Count 2.

1. Factual Background.

Count 2 charged defendant with the sale or furnishing of a controlled substance to a minor in violation of Health and Safety Code section 11353,[2] and the court instructed the jury pursuant to that section with CALJIC No. 12.10. During deliberations, the jury requested that the court give it a definition of the word "furnish." After consultation with counsel, the court determined to instruct the jury that "furnish means to supply by any means, by sale or otherwise." Defendant's counsel did not object, and the trial court so instructed the jury.

2. Discussion.

Defendant argues that the trial court has a duty to sua sponte define a statutory term when the term "'does not have a plain, unambiguous meaning, has a particular or restricted meaning' . . . or has a technical meaning peculiar to the law or an area of law." (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) He contends the court erred in instructing the jury on the meaning of the word "furnish" because a person does not "furnish" drugs merely by making them accessible to the minor or failing to physically prevent the minor from taking the drugs. Rather, by analogy to the offense of furnishing alcoholic beverages to a minor, he contends, "furnish" requires some affirmative conduct on the part of the defendant. (See, e.g., Bus. & Prof. Code §§ 25602, 25658; *Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905; *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal.App.3d 556, 559.) He contends the error was prejudicial because the question itself indicated the jury credited defendant's version of events, and would have permitted acquittal because he committed no affirmative conduct. Respondent contends defendant waived any claim of error due to his acquiescence to the

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[2] Health and Safety Code section 11353 provides in relevant part, "Every person 18 years of age or over, . . . (c) who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any such controlled substance to a minor, shall be punished by imprisonment in the state prison for a period of three, six, or nine years."

court's instruction; in any event, the instruction comported with the wording of Health and Safety Code section 11353; and any error was not prejudicial because the record demonstrates the jury necessarily found affirmative conduct.

No case has addressed the meaning of the word "furnish" in the context of a violation of Health and Safety Code section 11353. For purposes of statutory interpretation, in determining whether "furnish" contains a component of affirmative action as defendant argues, our first task is to ascertain the Legislature's intent. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) In determining legislative intent, we start with the words of the statute, giving them their usual and ordinary meaning. "When the language of the statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) We will not "'interpret away clear language in favor of an ambiguity that does not exist.' [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.)

According to the rules of statutory construction, we do not examine statutory language in isolation. Instead, we examine statutory language in the context of the statutory framework as a whole in order to determine the scope and purpose of a particular statute and harmonize it with the various parts of the statutory scheme. (*People v. Murphy, supra*, 25 Cal.4th at p. 142.) Furthermore, we must select a construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. (*Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1003.)

Business and Professions Code section 4026, which applies to the California Uniform Controlled Substances Act (Division 10 of the Health & Saf. Code, § 11000, et. seq.) defines furnish to mean "supply by any means, by sale or otherwise." (Bus. & Prof. Code, § 4026;

Health & Saf. Code, § 11016.)[3] This language precisely tracks the instruction the court gave the jury; the instruction was proper.

Were we to add to this definition the gloss defendant argues is necessary, we would disregard the plain language of the statute and its relevant statutory context. For that reason, we decline to address the applicability of the alcoholic beverage cases defendant cites because they apply different statutes which have their own statutory scheme. Importing their meaning into the context of the Controlled Substances Act, which contains its own definition of "furnish," would contravene the Legislature's intent.

B. Instruction on Lesser Included of Simple Possession on Count 2.

Defendant contends the court had a sua sponte duty to instruct on the offense of simple possession as a lesser included offense to sale or furnishing to a minor. He contends the instruction was supported by the evidence because jurors could have credited his testimony that he refused S.V.'s request for the cocaine, and that she took some despite his efforts to prevent her from doing so. This left the jury with an all-or-nothing choice to convict of the greater offense or to acquit him, although he admitted he possessed illegal drugs. He contends the error was prejudicial because at least some of the jury doubted S.V.'s credibility and partially credited his testimony.

The trial court is obliged to give, sua sponte, instructions on all theories of lesser included offenses that are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 159-160, 162.) However, "'*any* evidence, no matter how weak," will not justify instructions on a lesser included offense; such instructions must be given only where the evidence is substantial enough to merit consideration by the jury. (*Id.* at p. 162.) Error in failing to give lesser included instructions where required is reviewed under the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of harmless error. (*Breverman, supra,* 19 Cal.4th at p. 165.)

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[3] Health and Safety Code section 11016 provides that "furnish" has the meaning provided in section 4048.5 of the Business and Professions Code. Business and Professions Code section 4048.5 was repealed in 1996, and its provisions are now found at section 4026. (Stats. 1996, c. 890, A.B. 2802, § 2)

An uncharged crime is included in a greater charged offense if either (1) the greater offense cannot be committed without committing the lesser (the "elements test"), or (2) the accusatory pleading actually alleges all of the elements of the lesser offense (the "accusatory pleading test"). (*People v. Wolcott* (1983) 34 Cal.3d 92, 98.) To determine whether an offense is a lesser included, one of the two tests must be met. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

Under the first test, defendant here asserts that simple possession is a lesser included offense of the crime of sale of a controlled substance under Health and Safety Code section 11352; therefore, it should be a lesser included offense under section 11353. (*People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547.) As defendant recognizes, however, other authority finds that simple possession fails the elements test and is not a lesser included element of possession for sale. (See, e.g., *People v. Murphy* (2007) 154 Cal.App.4th 979, 984 ["one can broker a sale of a controlled substance that is within the exclusive possession of another"].)

Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Here, the information alleged that defendant sold, offered to sell, furnished, administered, and gave S.V. cocaine. Although the evidence adduced at trial may have established defendant had simultaneous possession of the cocaine while selling, furnishing, administering, or giving the cocaine to S.V., it is the averments of the pleadings that form the basis for the analysis. None of the acts alleged in count 2 described possession of a controlled substance. Given that the information, which tracks the statutory language, would have permitted conviction of the sale, administration, or furnishing of a controlled substance without defendant's possession of that substance, there was no error in instruction here.

III. ADMISSION OF PRIOR FELONY FOR IMPEACHMENT.

Defendant contends the trial court erred in admitting evidence of his 1995 felony conviction of possession of cocaine for purposes of sale. He argues the prior conviction was an aberration in an otherwise legally blameless life, and further that it is only obliquely

relevant to impeachment. (*People v. Harris* (2005) 37 Cal.4th 310, 337 [possession for sale crime of moral turpitude]; *People v. Rollo* (1977) 20 Cal.3d 109, 118 [different types of crimes reflect differently on the defendant's capacity for honesty].) He contends the error was prejudicial because of the close credibility contest between defendant and S.V.

A. Factual Background.

Defendant moved prior to his defense to exclude evidence of his 1995 conviction. He argued that under the four factors set forth in *People v. Beagle* (1972) 6 Cal.3d 441: (1) the nature of the crime did not involve honesty or veracity, (2) the crime was remote in time, (3) the crimes were similar to the charged offense and therefore prejudicial, and (4) admission affected his decision to testify. (*Id.* at p. 453; *People v. Collins* (1986) 42 Cal.3d 378, 385 [*Beagle* factors to be considered in determining whether to admit prior conviction pursuant to Evidence Code section 352].)

The prosecution argued that the prior conviction, while old, was reflective of defendant's character. Defendant contended the crime was 12 to 13 years old, and although a crime of moral turpitude, it did not involve dishonesty or lack of veracity. Further, he contended it was too similar to the current offenses and would therefore function more as prohibited propensity evidence. The court stated it would admit the evidence for impeachment purposes under *Beagle/Castro*[4] and by applying Evidence Code section 352. The court found although there would be prejudice from the evidence, it did not outweigh the evidence's probative value; the crime was one of moral turpitude and therefore reflected on defendant's honesty and veracity; the remoteness of the evidence did not mandate its exclusion; and that the court was not required to exclude the evidence merely because it was similar to the current offense.

[4] *People v. Castro* (1985) 38 Cal.3d 301, 317 [witness may be impeached with a crime involving moral turpitude, but trial court retains discretion to exclude prior conviction where its probative value is outweighed by the risk of undue prejudice].)

B. Discussion.

For impeachment purposes, the California Constitution allows the use of any felony conviction necessarily involving moral turpitude, subject to the trial court's discretion to exclude the prior under Evidence Code section 352 as more prejudicial than probative. (*People v. Castro, supra,* 38 Cal.3d at p. 306.) In exercising its discretion, the trial court must consider four factors, first set forth in *People v. Beagle, supra,* 6 Cal.3d 441: (1) the relationship between the prior felony and credibility; (2) the nearness or remoteness in time of the prior felony; (3) the similarity of the prior felony to the crime for which the accused is being tried; and (4) what the effect would be if the defendant chose not to testify. (*Id.* at p. 453.) "[T]rial courts have broad discretion to admit or exclude prior convictions for impeachment purposes, and must exercise that discretion on motion of the defendant. The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.)

Here, we find no abuse of discretion. Possession for sale of a controlled substance is a crime of moral turpitude. (*People v. Castro, supra,* 38 Cal.3d at p. 317.) "Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Moral turpitude involves a "'readiness to do evil'" which will support an inference of a witness's readiness to lie. (*People v. Castro, supra,* at p. 314.)

On the second factor, although the prior conviction was 12 years old, and succeeded by a crime-free period in defendant's life, it was not too remote in time to require automatic exclusion. (*People v. Burns* (1987) 189 Cal.App.3d 734, 738 [20-year-old conviction].) Rather, it was subject to the court's discretion to admit or exclude, and no abuse is manifest in its admission given the court's balancing of all of the factors.

The third factor, the similarity of the crimes, did not render the impeachment evidence prejudicial. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) "While the *Beagle* guidelines suggest identical or similar priors should be admitted sparingly, where,

as here, there are no other available priors, the prosecutor must either offer the identical prior or forego the impeachment altogether. We do not think under the facts of this case the *Beagle* guidelines required the trial court to bar any impeachment." (*People v. Foreman* (1985) 174 Cal.App.3d 175, 182.) Given the importance of credibility to this case because of the two main witnesses' divergent versions of events, the trial court did not abuse its discretion in determining the prior conviction's probative value outweighed any potential prejudice due to similarity. Finally, because he in fact testified, the admission of the evidence did not unfairly deprive defendant of his ability, or willingness, to testify on his own behalf.

IV. LIFETIME SEX OFFENDER REGISTRATION.

Defendant contends that all four of his sex offenses were subject to discretionary lifetime sex offender registration, and that the trial court erred in finding his conviction on counts 9 and 10 for violation of Penal Code section 289[5], subdivision (h) were subject to mandatory registration. He argues we should apply the rationale of *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), which invalidated the mandatory registration requirement for convictions of oral copulation with a minor (section 288a, subd. (b)(1)) on equal protection grounds because mandatory registration was not required for statutory rape (section 261.5), and conclude that mandatory registration is not required for violations of section 289, subdivision (h). In any event, he argues that the court abused its discretion in imposing sex offender registration on all four counts because it failed to follow a two-step process by which it would first find whether the crime was committed as the result of sexual compulsion or for purposes of sexual gratification, and then balance the reasons for and against registration. (*Hofsheier, supra,* 37 Cal.4th at p. 1197.)

A. Factual Background.

At the sentencing hearing, the court requested argument concerning whether defendant should be required to register as a sex offender pursuant to section 290, and specifically requested argument concerning the import of *Hofsheier*. The court indicated that

[5] Unless otherwise noted, all further statutory references are to the Penal Code.

on counts 7 and 8, it would order registration under the discretionary provisions because defendant committed the offenses as the result of a sexual compulsion or for purposes of sexual gratification. Further, the court noted on counts 9 and 10 that a violation of section 289, subdivision (h) was still subject to mandatory registration, although "some authorities suggest that the analysis would be similar [as that of *Hofsheier*]. So if that section were to be challenged [under *Hofsheier*], I think that the court could still impose the [section] 290 registration requirement under [the] discretionary provision." The court therefore indicated that it would order registration for counts 9 and 10 under the mandatory requirements, but should mandatory registration later be invalidated, the court specifically found that registration would be appropriate under the discretionary provisions.

Defendant objected to mandatory registration, and also asked that the court not require defendant to register under the discretionary provisions for any of the four sexual offenses. He pointed to the fact he had no priors, was in his forties, the sex offenses occurred because of drugs and alcohol, and defendant had been divorced. The court noted that the offenses fell "squarely within" the discretionary provisions because they were committed for purposes of sexual gratification. The court ordered sex offender registration pursuant to section 290, subdivision (a)(2)(E) for counts 7, 8, 9, and 10, noting particularly "the registration requirement to counts 9 and 10 is appropriately imposed pursuant to the discretionary provisions" of section 290, subdivision (a)(2)(B).[6]

B. Discussion.

In *People v. Hofsheier, supra,* 37 Cal.4th 1185, the court held that the mandatory offender registration under section 290, subdivision (a)(1)(A) violated equal protection when applied to a person convicted under section 288, subdivision (b)(1) of oral copulation with a minor between the ages of 16 and 18. (*Id.* at pp. 1201-1207.) *Hofsheier* found no rational basis for the classification which required lifetime registration for a sex offender convicted of oral copulation, while there was no such requirement for persons convicted of voluntary

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[6] These provisions of section 290 are now found at section 290.006. (Added by Stats. 2007, c. 579 (S.B. 172), § 14, eff. Oct. 13, 2007.)

sexual intercourse with a girl of the same age under section 261.5. (*Ibid.*) *Hofsheier* limited its holding to the "validity of the mandatory registration requirement for the first category [section 288, subdivision (b)(1)]." (*Id.* at p. 1195.)

We need not decide the legal question of whether *Hofsheier* applies to section 289, subdivision (h) because the court indicated that under the discretionary provisions, it would require defendant to register. On that point, defendant argues that the court abused its discretion. We disagree.

In *Hofsheier, supra,* that court recognized that while sex offender registration is not punishment, it nonetheless imposes an onerous burden. (*Id.* at p. 1197.) In imposing discretionary registration, therefore, the court must engage in a two-step process: (1) it must find the offense was committed as a result of sexual compulsion or for the purpose of sexual gratification, and state its reasons, and (2) state the reasons for requiring lifetime registration. The second prong permits the court to "weigh the reasons for and against registration in each particular case." (*Ibid.*)

Here, the trial court complied with these directives. The court stated, "I do realize that imposing the registration requirement has consequences for [defendant's] life in terms of I know it makes it hard to get a job and the like. [¶] . . . [T]he offense does fall squarely within the discretionary provisions because the offenses here were clearly for purposes of sexual gratification and having sex with the minor providing cocaine, using the drugs to enhance the sexual acts to me that is an appropriate exercise of the court's discretion. . . ."

V. CONSECUTIVE SENTENCES.

Defendant argues the trial court erred in imposing consecutive sentences based on facts not found by the jury or admitted by him in violation of the Sixth Amendment. (*Blakely v. Washington* (2004) 542 U.S. 296.) This contention is without merit. The United States Supreme Court has held that the Sixth Amendment does not apply to a trial court's determination to impose a consecutive sentence. (*Oregon v. Ice* (2009) __ U.S. __, 129 S.Ct. 711, 718.)

VI. CORRECTION OF ABSTRACT.

Defendant has requested that the abstract of judgment be corrected to reflect that the offenses of Counts 7 through 10 (oral copulation of a minor in violation of section 288a, subdivision (b)(1), and sexual penetration by a foreign object against a minor in violation of section 289, subdivision (h)) are not violent felonies. (§ 667.5, subd. (c); *People v. Mitchell* (2001) 26 Cal.4th 181, 183 [court may correct abstract of judgment where discrepant with judgment proclaimed in court].) Respondent concedes this point. We agree.

DISPOSITION

The judgment is modified to reflect that the offenses of counts 7 through 10 are non-violent felonies. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.